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No. 82-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

Response to Petition For a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

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QUESTION PRESENTED*

Whether the Fifth Amendment requirement of just compensation compels the payment of interest on a condemnation award for the delay between the entry of judgment and the date of payment when the land being condemned does not produce any income, the landowners have been deprived of any viable economic use of the property since the entry of judgment, and the landowners remain liable for the expenses of the property for the period of delay in payment?

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*The Respondents in this appeal are Edward M. Walsh, Trustee for the Chapter 11 estate of Edward R. Fitzsimmons, Elenora C. Lynch, individually and as Executrix of the Estate of Frank W. Lynch, Elizabeth S. Fitzsimmons, Karl Melchers, Karen W. Melchers Stackhouse and Helene Goode Stackhouse.

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Response to Petition For a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

REASONS FOR DENYING THE PETITION

This case involves the just compensation payable to landowners of non-income producing property in a condemnation action. The precise issue is whether the landowners are entitled to compensation for the government's delay in payment subsequent to the entry of judgment. It is the Respondents' position that without payment for this delay the Fifth Amendment's requirement of just compensation is not fulfilled because, during the period of delay, the landowners have been deprived of any viable economic use of their property while remaining liable for all of the prop-

erty's expenses. The Ninth Circuit found that under these circumstances a taking occurs when the judgment is entered and the government must pay interest from the date of taking to the date of payment.

1. The Reasons for Granting the Petition begin with the statement that this case presents an important and recurring question concerning the government's obligation to pay interest. This statement is supported by a footnote citing four cases. In each of those four cases the Courts have held that interest is payable to a landowner of non-income producing property for a period of time prior to possession and payment by the government. *United States v. 15.65 Acres of Land in the County of Marin, State of California* (9th Cir., May 25, 1982, rehearing denied, September 10, 1982), a copy of the as yet unpublished opinion is reprinted as Appendix A hereto, *United States v. 2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries,* 520 F.Supp. 75 (E.D. Tex. 1981), *United States v. 59.29 Acres of Land in Hardin County, Texas,* 495 F.Supp. 212 (E.D. Tex. 1980), *United States v. Certain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Comomnwealth of Massachusetts* (D. Mass. 1982), the decision in this last case is unreported so a copy of the decision is reprinted as Appendix B hereto.

State courts that have encountered this same question have reached the same result: the constitutional mandate of just compensation requires the payment of interest to the owners of non-income producing land to compensate them for the delay between valuation and payment. *State v. Nordstrom,* 253 A.2d 163, 54 N.J. 50 (1969), *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242 (Alaska Supreme Court, 1974), *Lazy Mountain Aviation v. City of Palmer,* 618 P.2d 570 (Alaska Supreme Court, 1980).

One of the important factors in this Court's decision to grant a petition for certiorari is the existence of conflicting rules among the lower courts. In the present case there is no conflict among the lower courts. Every court that has squarely addressed the issue as to whether an owner of non-income producing property is entitled to interest for the post-judgment delay in payment by the government has held that the constitutional requirement of just compensation compels the award of interest. The consistency of the holdings in these various cases by these many courts may make the holdings important and recurring to the government, but it does not necessarily follow that this Court should take the time to hear and rule upon an issue that is being consistently determined by the lower courts.

For this reason alone, the petition for certiorari should be denied.

2. The government argues as a reason for granting the petition that the rule expressed in these cases will impose an unanticipated increase in the government's cost of acquiring property. The rule expressed by this case, and the other similar cases, is that the landowners are not paid the just compensation required by the Fifth Amendment of the United States Constitution unless interest for post-judgment delay is included. The government's position is that a rule developed to insure the constitutionally-required payment of just compensation should be reviewed and altered by this Court because it will impose a financial burden on the government. This Court, however, is not the guardian of the Treasury.

Judgment was entered in this case on November 9, 1977. The amount of the judgment was not deposited with the clerk of the court until one year later, on November 17, 1978. Ten days later the government deposited an additional

$239,802.90, representing interest at 6% on the judgment for the one year period. The interest was later permitted to be withdrawn. The facts of the case therefore demonstrate that the government voluntarily delayed the payment and budgeted for the payment of interest. If the government in this case desired to prevent the running of interest, it could have deposited the amount of the judgment when the judgment was entered.

The increase in costs to the government necessitated by an interpretation of the requirements of the Fifth Amendment is not a compelling reason for this Court to review the ruling of the Ninth Circuit. If the government cannot afford to pay just compensation for property it is seeking to condemn, it should not acquire the property.

3. The government argues that this case should be granted certiorari because it is inconsistent with this Court's ruling in *Danforth v. United States,* 308 U.S. 271 (1939). Their argument is in error. The opinion of the Ninth Circuit specifically sets forth its consistency with the *Danforth* opinion. As pointed out in the Ninth Circuit's opinion, *Danforth* expressly does not apply to situations where "a taking has occurred previously in actuality." (*Danforth v. United States, supra,* 308 U.S. at 284 and cited and discussed in the Ninth Circuit's opinion in this case at Petitioner's App. A, 3a-4a). The Ninth Circuit in this case expressly found that a taking occurred in actuality, under the present circumstances, at the date of entry of judgment.

This Court has recognized that the determination of when a taking occurs is a very difficult one, and one that is very dependent upon the particular circumstances of each case:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a

problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead,* 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining* Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); see *United States v. Caltex, Inc.,* 344 U.S. 149, 156, 73 S.Ct. 200, 203, 97 L.Ed. 157 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-banker expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra,* 369 U.S., at 594, 82 S.Ct., at 990. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-24, 98 S.Ct. 2646, 2659 (1978).

The Ninth Circuit analyzed the facts of this case under these principles. The Ninth Circuit found that the land being condemned was not income producing, that the owners were prevented from developing the land from the entry of

judgment, and that the owners nevertheless remained liable for all expenses relating to the land until payment. The Ninth Circuit found that under these circumstances "the judgment effectively takes the condemnee's land by denying any economically viable use." (See Petitioner's App. A, 6a.) The facts of this case, wherein the entry of judgment was found to have denied the landowners any economically viable use of their property, is therefore materially different from the facts in *Danforth* wherein the landowner's ability to use or sell his land was merely reduced by the government's actions.

The government claims that the Ninth Circuit overlooked the analysis upon which the *Danforth* conclusion was based (i.e. that the condemnation award is an offer, subject to acceptance by the government, that provides it with the opportunity to determine the cost of any piece of property). This conclusion of the *Danforth* case is not inconsistent with the holding of the Ninth Circuit. The Ninth Circuit simply held that compensation is due the landowners for any delay from the entry of judgment because the landowners are deprived of all economic use of their land from that date. If the government decided after six months that it did not wish to purchase the property it could so elect, as long as the landowners were compensated for the six months they were without any use of their property.

The opinion of the Ninth Circuit is therefore consistent with the analysis and conclusions of *Danforth*. If the condemnation judgment is an option, the requirement that the landowners be compensated for the delay in exercising the option is merely the constitutionally-required just compensation for the option. In the present case the government decided to exercise its option and paid the determined value one year later than the recognized date of taking. Interest

from the date of taking to the date of payment is the judicially-accepted procedure for insuring that an owner is paid just compensation as of the date of taking. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 305 (1923).

Contrary to the government's argument, the analysis of the Ninth Circuit is consistent with and applies the principles of this Court. The petition for a writ of certiorari should therefore be denied.

4. The government argues that the Ninth Circuit's distinction between vacant, unimproved land and income producing land does not withstand analysis because unimproved land can produce income. This argument is a misreading of the Ninth Circuit's opinion. The distinction drawn by the Ninth Circuit is between income producing and non-income producing property. Throughout the opinion reference is made to the critical fact that the Respondents' property did not produce any income. (Petitioner's App. A, 2a, 3a, and 6a)

The analysis of the Ninth Circuit is clearly based upon this distinction between property that produces income and property that does not produce income. For property that does not produce income, any delay in payment after the entry of judgment reduces the actual amount of compensation to the landowners because they have remained liable for the expenses of the property without any off-setting income. The government's argument is therefore a misreading of the Ninth Circuit's opinion that is designed to create doubt as to the validity of its conclusion. The validity of the analysis of the Ninth Circuit in this case is supported by the similar rulings of the Supreme Court of New Jersey (*State v. Nordstrom, supra*), the Supreme Court of Alaska (*Stewart & Grindle, Inc. v. State, supra*, and *Lazy Mountain Aviation v. City of Palmer, supra*), a completely sep-

arate panel of the Ninth Circuit Court of Appeals (*United States v. 15.65 Acres of Land in the County of Marin, State of California, supra*), two different federal district courts in the Eastern District of Texas (*United States v. 2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries, supra*, and *United States v. 59.29 Acres of Land in Hardin County, Texas, supra*), and a federal district court in the District of Massachusetts (*United States v. Certain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, supra*).

5. Lastly, and most unpersuasive of all, the government argues that fairness does not require the award of interest to an owner of non-income producing land for the delay between the entry of judgment and the payment. The government concludes its petition by stating:

> it is reasonable to treat the condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

If a proper analogy to a commercial transaction is drawn, however, it is evident that the payment of interest is required. In a commercial transaction where the price of merchandise is established and the purchasing party is given the right to purchase at that price in the future, it is called an option. The option is a valuable contractual right to the prospective purchaser. In a normal commercial setting options are never free. Requiring the government to pay interest for the delay between the entry of judgment and payment is just compensation for their option.

How is it fair that the government can pay, on November 17, 1978, the amount determined to be the value of the property as of June, 1977? Even if the property did not

increase in value, a proposition Respondents refute, just compensation has not been paid because the owners have remained liable for all expenses of the property without any off-setting income. Courts must recognize the reality of today's economy. Paying $1.00 tomorrow to discharge a debt of $1.00 due and payable today is paying less than is owed. See *United States v. Blankenship*, 543 F.2d 1272, 1275 (9th Cir. 1976).

The rule that the government should compensate the landowner for the delay in payment is fair to the government because it is the government, and only the government, that can prevent the harm to the landowner by depositing the money with the clerk of the court. Any disadvantage to the government can be alleviated by the government acting promptly. Fairness therefore requires that the landowners be compensated for the delay in payment and for paying all expenses of the property during the period of delay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submited.

ROBERT A. HUDDLESTON
Attorney for Respondents

November 1982

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 81-4062
No. 81-4101

DC# CV-77-0998-SW

UNITED STATES OF AMERICA,
Plaintiff-Appellant/Cross-Appellee,

vs.

15.65 Acres of Land in the County of Marin, State of California; MARIN RIDGELAND COMPANY, a joint venture comprised of O.D.C. of CALIFORNIA, INC., a corporation; and J. H. SCHEUER, a.k.a. JAMES H. SCHEUR; HOUSING AUTHORITY OF THE COUNTY OF MARIN; REDEVELOPMENT AGENCY OF THE COUNTY OF MARIN; and UNKNOWN OWNERS,
Defendants-Appellees/Cross-Appellants.

OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted March 9, 1982

Before: CHOY, SNEED, and SCHROEDER, Circuit Judges

SNEED, Circuit Judge:

James H. Scheuer and Marin Ridgeland (both hereafter designated as the Company) owned a 164.03 acre tract, which they were developing for residential use. Their neighbors, Glass and Fitzsimmons also intended to develop

their lands. A condition to the latter developments was the dedication to public use of a road, which would provide southern access to the Company's property (*see* diagram, Appendix A). Optimal development of the Company's land depended upon such access.

In 1977, the government instituted contemporaneous condemnation actions against Glass, Fitzsimmons and the Company to acquire land for the Golden Gate National Recreation Area (G.G.N.R.A.). The condemnation trial for 15.65 acres of the Company's land began on July 28, 1980. The jury awarded $623,196 in "severance damages." In determining this amount, they were permitted, over objection, to consider the effect of both loss of access and a probable change to a much more restrictive zoning classification. The government contends that neither should have been considered. The Company cross-appeals the denial of its motion for post-judgment interest. Our jurisdiction rests on 28 U.S.C. § 1291. We reserve the judgment with respect to severance damages and remand for further proceedings. We also reverse the denial of the Company's motion regarding interest.

I.

SEVERANCE DAMAGES

Unless there is a taking,[1] the government is not required to compensate a landowner even though its actions affect the value of his land. *United States v. Fuller*, 409 U.S. 488, 492 (1973); *Campbell v. United States*, 266 U.S. 368, 371 (1924). When there is a taking, the Fifth Amendment mandates payment of the value of the taken lands. Several rules have been developed for determining the extent to which

1. The parties to this case do not dispute that there has been or will be a taking of some of the Company's property.

to compensate a landowner even though its actions affect

this value includes so-called severance damages. First, severance damages, consisting of a diminution in value of the remainder resulting from the taking and use of the part of the land, are recoverable. *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. 91.90 Acres of Land*, 586 F.2d 79, 86 (8th Cir. 1978), *cert. denied*, 441, U.S. 944 (1979). Second, severance damages do not include any diminution in value arising solely from "the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. at 372, *see also United States v. 10.0 Acres of Land*, 533 F.2d 1092, 1097 (9th Cir. 1976) (Carter, J., dissenting); *Gibson & Perin Co. v. Cincinnati*, 480 F.2d 936, 944-45 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

Both rules lead to sensible results. A private seller, upon receiving a bid for a portion of his land and responding thereto in a rational manner, will fix his asking price at an amount that will compensate him for any diminution in value of the remainder of his land. The buyer must pay this price if he wishes to acquire the portion he seeks. On the other hand, a private landowner whose property has its value reduced by the acquisition and use of an adjoining neighbor's land by a third party buyer ordinarily cannot recoup this loss from either the neighbor or the third party buyer. Only the imposition of a duty by operation of law can alter this result. In the absence of such a duty, the third party buyer, having no need for any of the injured landowner's property, will pay him nothing, and the neighbor obviously will not be moved to share voluntarily the proceeds of his sale. Under these circumstances the injured landowner has no remedy. The government in condemnation proceedings is subject to the burdens, as well as the benefits, of these economic realities inasmuch as its liability,

as the Court in *Campbell* explained, is no broader than that of a private party. 266 U.S. at 372.

The application of these rules becomes complex when the injury to the landowner may be said to flow both from the taking and use of but a portion of his property *and* from the use to which the government puts land taken from a third party neighbor. At first blush the problem appears to be merely that of choosing which of the above two rules should apply. Reflection and case authority suggest, however, that a third rule is required. This rule appears in *United States v. Pope & Talbot,* 392 F.2d 822 (9th Cir. 1961), in which payment for reduced accessibility of land *not* taken was permitted when a dam project undertaken by the condemnor government flooded a road which traversed both the government's land and the property taken from the condemnee landowner. In that case we noted the existence of three factors that distinguished it from *Campbell,* the source of the second rule stated above: (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project. 293 F.2d at 825. Thus, three elements, indispensability, substantiality, and inseparability, are necessary to negate the application of *Campbell.*

The necessity of these elements is also quite sensible. The element of indispensability assures that the government is being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand

payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact, of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

The Company in this case did not attempt to utilize these elements in its efforts to recover for the decline in value of the land retained attributable to the loss of access and down-zoning. Nor was the jury charged in accordance with the teaching of *Pope & Talbot, Inc.* The portion of the charge applicable to severance damages, which is set forth in the margin,[2] is quite general. The operative portion provides:

> "If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access

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2. This portion of the charge is as follows:

"You are instructed that no consideration shall be given to nor allowance of just compensation made for any elements of value depending upon events or circumstances or combination of occurrences, which, while within the realm of possibility, have not been shown by a preponderance of the evidence by the landowners to be reasonably probable in the reasonably near future after the date of valuation.

For example, the property owners assert the value of the remainder has been diminished by the taking of the Glass and Fitzsimmons properties by virtue of their belief that had such properties developed without intervention of the project, a southerly access to the subject property over the Glass and Fitzsimmons properties would have been available.

If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder." R.T. 1267

> would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder."

Under this charge the compensability of the decline in value of the Company's retained 148.38 acres turns exclusively on the "reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available."

In no way does this charge link the 15.65 acres taken from the Company with the taking and use of the Glass and Fitzsimmons property. The taking of the 15.65 acres would appear to be an adventitious event that permits, contrary to the rule of *Campbell*, compensation for a decline in value of the retained 148.38 acres resulting *solely* from the taking and use of the Glass and Fitzsimmons properties. In essence, the charge appears based on the principle that a taking and use of my neighbor's land by the government that diminishes the value of my land entitles me, without any further showing, to compensation under the Fifth Amendment. This is not the law.

The required linkage between the Company's 15.65 acres taken by the government and the taking and use of the Glass and Fitzsimmons property consists of the three elements of *Pope & Talbot, Inc.* previously discussed. The jury charge must incorporate not only the reasonable probability that but for the taking of the Glass and Fitzsimmons properties the southern access would have existed, but also the indispensability of the Company's 15.65 acres to government program of acquisition for the G.G.N.R.A., which included the acquisition of the Glass and Fitzsimmons properties, the consequentiality of the Company's tract to this pro-

gram, and the necessity that the decline in value of the retained 148.38 acres be attributable *both* to the taking and use of the 15.65 acres of Company land and the taking and use of the Glass and Fitzsimmons properties.

Notwithstanding the necessity of establishing the *Pope & Talbot, Inc.* linkage when compensation is sought for a decline in value attributable in part to the taking of a neighbor's property, the Company in this case is entitled to compensation for such decline in value in its retained 148.38 acres if it is able to show by a preponderance of the evidence that this decline is *solely* attributable to the taking and use of its 15.65 acres. Obviously any decline attributable to the taking and use of the Glass and Fitzsimmons tracts would not be compensable under this approach. The loss of southern access would not appear to be compensable under this approach;[3] but the state of the record precludes a ready answer with regard to down-zoning.[4] Perhaps the Company can demonstrate that the probability of down-zoning was solely attributable to the taking and use of the 15.65 acres. In any event, on remand it is entitled to try.

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3. This assumes that it is impossible to determine or separate loss access due to the taking of the 15.65 acres and from that resulting from the taking of Glass and Fitzsimmons lands. If damages are separable, the two general rules can be directly applied to each kind of damages. *See* Georgia-Pacific Corp. v. United States, 640 F.2d 328 (Ct. Cl. 1980).

4. There were some indications in the record that it was the special view from the ridge which county officials were seeking to protect.

The government contends on appeal that a zoning change cannot be a proper factor to consider when calculating severance damages. We disagree. A probable zoning change would be considered by a private buyer in determining fair market value of the property, and therefore may be considered in a condemnation proceeding. United States v. 174.12 Acres of Land, No. 80-3433 (9th Cir. Feb. 8, 1982); United States v. 320.0 Acres of Land, 605 F.2d 762, 819 (5th Cir. 1979).

For the reasons set forth above we must reverse the judgment below insofar as it awards severance damages in the amount of $623,196, and remand for further proceedings that are in accord with this portion of our opinion.

II.

THE CROSS-APPEAL: POST JUDGMENT INTEREST

The Company cross-appeals the denial of its motion for post judgment interest.

Although interest is usually not available on a judgment against the United States absent a statute, *DeLucca v. United States,* No. 81-5011 (9th Cir. Mar. 1, 1982), the Fifth Amendment makes interest available when a taking precedes payment. *United States v. 174.12 Acres of Land,* No. 80-3433 (9th Cir. Feb. 8, 1982); *United States v. Johns,* 146 F.2d 92, 93 (9th Cir. 1944). However, condemnees are not entitled to interest before the date of the taking. *Danforth v. United States,* 308 U.S. 271, 286 (1939); *United States v. 156.81 Acres of Land,* No. 79-4547 (9th Cir. Mar. 12, 1982). The issue before us, therefore, is when, if ever, did a taking occur?

The trial court held that the government had not yet taken the land because it had neither filed a declaration of taking nor entered into possession. However, there is no simple formula for establishing when property has been taken. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Rather, deciding when a taking occurs requires an ad hoc inquiry into when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

The effect of a condemnation suit on unimproved land held for development is significantly different from its effect on developed property. While a condemnation suit may change the value of improved property somewhat, the owner usually continues to enjoy the beneficial use of his land until a declaration of taking is filed. *See Gould v. United States,* 301 F.2d 557, 559 (D.C. Cir. 1962) (no interest where owner received income and retained title and possession). Intervening fluctuations in value are indistinguishable from the usual burdens of ownership and do not constitute a taking. *Agins v. Tiburon,* 447 U.S. 255, 263 n.9 (1980); *Danforth,* 308 U.S. at 285. Therefore, when the government condemns improved or productive property, neither the stipulated date of valuation, *United States v. Mahowald,* 209 F.2d 751, 754 (8th Cir. 1954), nor the date of judgment, *Danforth,* 308 U.S. at 284; *Gould,* 301 F.2d at 560, mark the date of a taking.

On the other hand, when the property condemned is intended for development and sale, and remains unimproved, the owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon,* 447 U.S. 255, 263 n.9 (1980). Also, as was pointed out by the majority in *United States v. 156.81 Acres,* No. 79-4547 (9th Cir. Mar. 12, 1982), no one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. *Accord State v. Nordstrom,* 54 N.J. 50, 253 A.2d 163, 166 (1969); *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242, 1247 (Alaska 1974). The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

Under these circumstances, we hold it proper to invoke the rule that when the government deprives an owner of all economic use of his land, there has been a taking. *156.81 Acres, supra; see also Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n.36 (1978). In this case a virtual ban on development and sale has been imposed that has rendered impossible any economic use of the 15.65 acres. We therefore hold that the land has been taken.

The next question is when did it occur? Under the somewhat unusual circumstances of this case, we find the stipulated date of valuation to be the date. *156.81 Acres, supra,* in which the date of judgment was held to be the date of the taking, does not compel a different result. In that case, valuation was just one month before trial. The landowners were therefore not burdened for long with the development limitations which, together with the sale restriction, rendered the land useless. In contrast, the parties here valued the land as of a date more than one year before the start of the trial and were without use or compensation for a long period of time. Applying a sense of "justice and fairness," *Penn Central Transportation,* 438 at 124, we hold that the landowners are entitled to interest from May 5, 1979, the date of valuation.

Nor are we barred from reaching this result by the Company's request for interest only from the date of judgment, December 8, 1980. It would be unfair to adhere to that date in view of our reversal of that portion of the judgment pertaining to severance damages. To postpone the date of taking to a time subsequent to the date our mandate becomes effective would be even more unfair. The date we have selected, May 5, 1979, we believe is a just and fair one.

The appropriate rate of interest is an issue of fact. *United States v. 429.59 Acres of Land,* 612 F.2d 459, 464

(9th Cir. 1980); *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976). We therefore remand the case to the district court for a determination of the proper interest rate.

III.

CONCLUSION

We reverse and remand this case to the trial court for a determination of the proper amount of severance damages, if any, and the proper rate of interest. In all other respects the judgment, as modified by this opinion, is affirmed.

REVERSED AND REMANDED IN PART; AFFIRMED AND MODIFIED IN PART.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 68-208-C
TRACT NO. 18T-2925

CIVIL ACTION NO. 72-1423-C
TRACT NOS. 14T-3505
14T-3522
14T-3523

CIVIL ACTION NO. 73-780-C
TRACT NO. 25T-5788

CIVIL ACTION NO. 73-1051-C
TRACT NO. 14T-3467

CIVIL ACTION NO. 73-1278-C
TRACT NO. 19T-5108

CIVIL ACTION NO. 74-216-C
TRACT NO. 16T-2578

CIVIL ACTION NO. 74-1833-C
TRACT NO. 18T-3139

CIVIL ACTION NO. 74-4664-C
TRACT NO. 18T-2964

CIVIL ACTION NO. 73-1837-C
TRACT NOS. 25T-5775
25T-5787
25T-5780

CIVIL ACTION NO. 75-3546-C
TRACT NO. 11T-2239

United States of America,

Plaintiff,

v.

Certain Lands in Eatham, Truro and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, et al,

Defendants.

ORDER

May 28, 1982

CAFFREY, Ch. J.

In each of the above-captioned tracts the issue of ownership of the tract has been resolved by the Court and the valuation of each individual tract has been determined by a trial before the three Commissioners appointed by this Court to value tracts taken by the government for the Cape Cod National Seashore. Subsequent to the filing of the findings of the Commissioner, the United States, for circumstances obviously beyond the control of the United States Attorney for this district or the Assistant United States Attorneys who have been representing the United States in this litigation, has failed to pay the landowners the amount determined by the Commissioners to constitute just compensation for the taking.

The owners of the land taken have now filed motions for the payment of interest on the condemnation awards made for each of the above-referenced tracts. The motion has been opposed by the government and has been briefed and argued by the parties.

It requires no great legal scholarship for a person to realize that the government's power to take private property by eminent domain is subject to the Fifth Amendment to the Constitution of the United States which in turn

requires that there be no taking of property by the sovereign without due process of law. It likewise requires no scholarship to understand that due process of law carries with it the obligation on the sovereign to make payment to the private citizen within a reasonable time after the taking by eminent domain.

In the instant case, the conduct of the Department of Interior in connection with the establishment of the Cape Cod National Seashore has been a classic example of the denial of due process to those persons whose land has been taken. The land has effectively been tied up for Federal Government purposes since Congress in 1961 enacted Public Law 87-126, Sec. 4(d), codified at 16 U.S.C. § 4596-3(d). That statute created the Cape Cod National Seashore, and shortly thereafter *lis pendens* were filed in the Barnstable Registry of Deeds concerning most of the tracts involved. Since that time the landowners have been unable to sell their land or do much of anything with it other than pay municipal taxes thereon.

The Supreme Court of the United States in a number of decisions has ruled that the Fifth Amendment requires the payment of interest to landowners whose land is taken but not promptly compensated for. *See Seaboard Air Line Railway Co. v. United States,* 261 U.S. 299 (1923) and *United States v. Rogers,* 255 U.S. 163 (1921). The validity of those decisions, both filed in the 1920's, has been reaffirmed by the Supreme Court in *United States v. Klamath Indians,* 304 U.S. 119 (1938) and such cases as *Albrecht v. United States,* 329 U.S. 599 (1946).

The validity of the ruling that the government has an obligation to pay interest to the landowner when the government has been tardy in making prompt payment for the taking of private property has been recognized in *United*

States v. 106.64 Acres of Land, 264 F.Supp. 199 (D. Neb. 1967) and more recently in *United States v. 59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Texas 1980).

Accordingly, I rule that the due process clause of the Fifth Amendment requires that the United States pay interest at the rate of 8% to each of the owners of the above-listed tracts from the date of the filing of the Commissioners' report for that particular tract to the date of payment of the judgment in that amount.

Andrew A. Caffrey, Ch. J.